

to prove, in reasonable detail, to the satisfaction of the City at all times throughout the term of this Agreement, that the Company is in compliance with each term and condition of this Agreement.

9.3 Regulation by City. To the full extent permitted by applicable law either now or in the future:

(a) the City reserves the right to adopt or issue such rules, regulations, orders, or other directives governing the telecommunications industry as it shall find necessary or appropriate in the lawful exercise of its police power, and the Company expressly agrees to comply with all such rules, regulations, orders, or other directives; and

(b) the Director reserves the right to, from time to time, issue such lawful orders governing the Company, the System or the City Fiber as he shall find necessary or appropriate to carry out the purposes of this Agreement, and the Company expressly agrees to comply with all such lawful rules, regulations, orders, or other directives.

(c) No rule, regulation, order, or other directive issued pursuant to this Section 9.3 shall constitute an amendment to this Agreement.

9.4 Reports.

9.4.1 Company Report. The Company shall submit to the Director, annually, until substantial completion of construction of the Initial Backbone and the Government Loop, the Company's plan for financing completion of such construction.

9.4.2 Additional Information. Upon the request of the Board, the Comptroller or the Director, the Company shall, subject to the provisions of Section 9.1 hereof with respect to proprietary information, promptly submit to the requesting party any information or report reasonably related to the Company's obligations under this Agreement, in such form and containing such information as the requesting party shall specify.

9.4.3 Status Reports. (a) The Company shall submit to the Director reports describing, in detail, the status of the construction of the Initial Backbone in accordance with Appendix B. The first such report shall be submitted within six (6) months after the date of commencement of construction of the Initial Backbone. All such reports shall be updated every six (6) months thereafter until completion of construction of the Initial Backbone.

(b) The Company shall submit to the Director reports describing, generally the status of any Additional Backbone every six (6) months after the commencement of

construction thereof until its substantial completion. The Company shall notify the Director of substantial completion of the Additional Backbone.

9.4.4 Financial Reports. (a) The Company shall submit to the Comptroller and the Director not later than forty-five (45) days after the end of each quarterly fiscal period, a copy of the Company's quarterly financial report.

(b) The Company shall submit to the Comptroller and the Director, not later than four (4) months after the end of each annual fiscal period, with respect to said period just ended, a copy of the Company's annual financial statements which statements, unless otherwise agreed to by the Comptroller, shall be audited and certified by an independent certified public accountant in accordance with generally accepted accounting principles.

(c) In the event of any transfer of the System to any Person pursuant to this Agreement, the Company shall remit to the City the balance due of any payment required by Section 8.1.1 as of the date of the transfer as a condition of any such transfer.

9.5 Additional Filings. Within twenty (20) business days after the Company has received from or submitted to any municipal, state, county or federal agency or official any

communication, public report, petition or other filing which pertains to any aspect of operations or the financial arrangements in connection with the System or this Agreement or which in any way materially affects the System or any Service or the Company's representations and warranties set forth herein, the Company shall submit to the Director a copy of such report, petition, or other communication, provided, that the above shall not apply to any communications, public reports, petitions or other filings with respect to tax matters. A copy of each response thereto submitted to or received from such municipal, state, or federal agency or official by the Company, shall likewise be submitted promptly to the Director and in no case later than ten (10) days of its receipt. Notwithstanding the above, the Company shall submit to the Director only the notices of filings with the PSC and FCC unless the City requests all papers filed subsequently by the Company in connection therewith.

9.6 Books and Records/Audit

9.6.1 Books and Records. Throughout the term of this Agreement, the Company shall maintain complete and accurate books of account and records of the business, ownership, and operations of the Company with respect to the System and its operation in a manner acceptable to the Comptroller and the Director, provided that all financial books and records which are maintained in

accordance with the regulations of the PSC and generally accepted accounting principles shall be deemed to be acceptable. The Comptroller or the Director may reasonably require that additional books and records be maintained and provided as reasonably necessary to ensure proper accounting of all payments due the City.

9.6.2 Right of Inspection. The Board, the Comptroller, the Director, or their designated representatives, shall have the right to inspect, examine, or audit within New York City, during normal business hours and upon forty eight (48) hours notice to the Company, all documents which pertain to the Gross Revenues of the Company and with respect to the Company's other obligations pursuant to this Agreement. All such documents shall be made available within New York City in order to facilitate said inspection, examination, or audit, as provided in Section 9.6.1 hereof. All of such documents shall be retained by the Company for a minimum of six (6) years following termination of this Agreement. Access by the City to any of the documents covered by this Section 9.6.2 shall not be denied by the Company on grounds that such documents are alleged by the Company to contain proprietary information, provided that this requirement shall not be deemed to constitute a waiver of the Company's right to assert that the proprietary information contained in such documents should not be disclosed.

9.6.3 Protection from Disclosure. The City shall protect from disclosure any proprietary information required to be made available to the City pursuant to Sections 9.6.1 and 9.6.2, in accordance with applicable law.

9.7 Investigations

9.7.1 Company Cooperation. The Company agrees to cooperate fully and faithfully with any investigation, audit, or inquiry conducted by a State of New York or City governmental agency or authority that is empowered directly or by designation to compel the attendance of witnesses and to examine witnesses under oath, or conducted by the Inspector General of a governmental agency that is a party in interest to the transaction, submitted bid, submitted proposal, agreement, franchise, contract, lease, permit, or license that is the subject of the investigation, audit, or inquiry.

9.7.2 Failure to Testify. If: (a) any general partner, director, officer, principal, employee, or agent of the Company (hereinafter "requested person"), who has been advised that his or her statement, and any information from such statement, will not be used against him or her in any subsequent criminal proceeding, refuses to testify before a grand jury or other governmental agency or authority empowered directly or by designation to compel the attendance of witnesses and to examine

Witnesses under oath concerning the award of or performance under any transaction, agreement, lease, permit, contract, franchise, or license entered into with or granted by the City, the State, or any political subdivision or public authority thereof, or the Port Authority of New York and New Jersey, or any local development corporation within the City, or any public benefit corporation organized under the laws of the State of New York; or

(b) any requested person refuses to testify for a reason other than the assertion of his or her privileges against self-incrimination in an investigation, audit, or inquiry conducted by a City or State governmental agency or authority empowered directly or by designation to compel the attendance of witnesses and to take testimony under oath, or by the Inspector General of the governmental agency that is a party in interest, and is seeking testimony concerning the award of, or performance under, any transaction, agreement, lease, permit, contract, franchise, or license entered into with or granted by the City, the State, or any political subdivision thereof or any local development corporation within the City; then, the Board shall convene a hearing, upon not less than five (5) days' written notice to the parties involved, to determine if any penalties should attach for the failure of a person to testify. If any nongovernmental party to the hearing requests an adjournment, the Board may, upon granting the adjournment, suspend any contract, lease, permit, agreement, franchise, or

license pending the final determination pursuant to Section 9.7.4 hereof, without the City incurring any liability, penalty or damages for delay or otherwise.

9.7.3 Penalties for Failure to Testify. The penalties which may attach for a failure to testify after a final determination by the Board pursuant to Section 9.7.4 hereof may include, but shall not exceed: (a) the disqualification, for a period not to exceed five (5) years from the date of an adverse determination, of any requested Person, or any entity of which such Person was a member at the time the testimony was sought, including, but not limited to, the Company, from submitting bids for, or transacting business with, or entering into or obtaining any contract, lease, permit, franchise, agreement, or license with or from the City; and/or (b) the cancellation or termination of any and all existing City contracts, leases, permits, franchises, agreements, or licenses that the refusal to testify concerns and that have not been assigned nor the proceeds of which pledged, pursuant to this Agreement, to an unaffiliated and unrelated institutional lender for fair value prior to the issuance of the notice scheduling the hearing, without the City incurring any Liability, penalty or damages on account of such cancellation or termination, provided that any monies lawfully due from the City directly for goods delivered, work done, rentals, or fees accrued prior to the cancellation or termination shall be paid by the City.

9.7.4 Determination of Penalty. (a) The Board shall, reaching its determination and in assessing an appropriate penalty, consider and address the factors set forth in the following subsections (b) and (c) of this Section 9.7.4 and may also consider, if relevant and appropriate, the criteria set forth in the following subsections (d) and (e) of this Section 9.7.4, in addition to any other information which may be relevant or appropriate:

(b) the good faith endeavors or lack thereof by a requested Person, the Company to cooperate fully and truthfully with any governmental investigation or audit, including but not limited to the discipline, discharge, or disassociation of any requested Person failing to testify, the production of accurate and complete books and records, and the forthcoming testimony of all other members, agents, assignees, or fiduciaries whose testimony is sought;

(c) the relationship of the requested Person who refused to testify to any entity, including, but not limited to, the Company that is a party to the hearing, including, but not limited to, whether the Person whose testimony is sought has an ownership interest in said entity and/or the degree of authority and responsibility said Person has within the entity;

(d) the nexus of the testimony sought to the
ect entity and its contracts, leases, permits, agreements,
chises, or licenses with the City;

(e) the effect a penalty may have on an
filiated and unrelated party or entity that has a significant
rest in an entity subject to penalties under Section 9.7.3
of, provided that said unaffiliated and unrelated party or
ty has given actual notice to the Board upon the acquisition
said interest or, at the hearing called for in Section 9.7.2
of, gives such notice and proves that such interest was
iously acquired. Under either circumstance, such
ffiliated and unrelated party or entity must present evidence
the hearing demonstrating the potential adverse impact a
alty will have on said person or entity.

9.7.5 Definitions. For purposes of this Section 9.7:
the terms "franchise" or "agreement" as used herein shall
ude this Agreement; the franchise granted pursuant to this
ement, and any license, permit, franchise, or concession not
ted as a matter of right; (b) the term "person" as used
ain shall include any natural person doing business alone or
ociated with another person or entity as a general partner,
ector, officer, principal, employee, or agent; (c) the term
city" as used herein shall include any firm, partnership,
poration, association, joint venture, or other person that

ceives any money, benefit, license, lease, franchise, permit or consent from or through the City or otherwise transacts business with the City; and (d) the term "member" as used herein shall include any person associated with another person or entity as a general partner, director, officer, principal, employee, or agent.

SECTION 10 -- RESTRICTIONS AGAINST ASSIGNMENT
AND OTHER TRANSFERS

10.1 Transfer of Interest. Except as provided in Section 9.7 hereof and Appendix D to this Agreement, neither the franchise granted herein, nor any rights or obligations of the Company pursuant to this Agreement, shall be encumbered, assigned, sold, transferred, pledged, leased, sublet, or mortgaged in any manner, in whole or in part, to any Person, nor shall all title therein, either legal or equitable, or any right or interest therein, pass to or vest in any Person, either by act of the Company, by act of any Person holding Control of or any interest in the Company or the franchise granted herein, by operation of law, or otherwise, without the prior written consent of the Board, in accordance with the provisions of this Section 10, which consent may be withheld by the Board in its sole discretion.

10.2 Transfer of Control of Stock. A complete description of the ownership and Control of the Company is set forth in Appendix D to this Agreement. In the event this description changes prior to the Effective Date, the Company shall provide the Director with an updated Appendix D. Notwithstanding any other provision of this Agreement, no change in Control of the Company or the franchise granted herein shall occur after the Effective Date, by act of the Company, by act of any Person holding Control of or any interest in the Company or in the franchise granted herein, by operation of law, or otherwise, without the prior written consent of the Board. By way of example, but not limitation, the notice requirements of Section 10.3 hereof shall apply whenever any change is proposed in more than twenty percent (20%) of the ownership or Control of the Company, the System, the franchise granted herein or of any Person holding Control of or any interest in the Company or in the System or in the franchise, regardless of the manner in which such ownership or Control is evidenced (e.g., stock, bonds, promissory notes, pledges, or other indicia of ownership or Control). Notwithstanding the foregoing, the Board reserves the right, in its sole discretion, on a case-by-case basis, to grant petitions for consent to the transfer of Control of the Company or the franchise granted herein from Persons other than the Company. The City, its officers, employees, agents, attorneys, consultants and independent contractors retained by the City in

connection with such petition for transfer shall not be liable to the Company for exercising its rights herein.

10.3 Petition. The Company shall promptly notify the Board of any proposed action regarding the consent of the Board pursuant to Sections 10.1 or 10.2 hereof, by submitting to the Director, with a copy to the Corporation Counsel of the City, a petition requesting the approval of the Board. The petition shall fully describe the proposed action and shall be accompanied by a justification for the action and such additional supporting information as the Board or the Director may require in order to review and evaluate the proposed action. Upon review of the petition, the Director shall submit the petition to the Board together with a recommendation for action on the petition.

10.4 Public Hearing. After receipt of the petition the Board may, as it deems necessary or appropriate, schedule a public hearing on the petition. For the purpose of determining whether it shall grant its consent, the Board may inquire into:

(a) the qualifications of each Person involved in any action described in Sections 10.1 or 10.2 hereof,

(b) all matters relevant to whether said Person will adhere to all applicable provisions of this Agreement, and

(c) all other matters the Board deems relevant in evaluating the petition. Further, the Board may perform a comprehensive audit of the company's performance under the terms and conditions of this Agreement. The Company shall provide all requested assistance to the Board in connection with any such inquiry and, as appropriate, shall secure the cooperation and assistance of all Persons involved in said action.

10.5 Conditions. As a condition to the granting of any consent required by Sections 10.1 or 10.2 hereof, the Board may require that each Person involved in any action described in Sections 10.1 or 10.2 hereof shall execute an agreement, in a form and containing such conditions as may be specified by the Board, providing that said Person assumes and agrees to be bound by all applicable provisions of this Agreement and such other conditions which the Board deems necessary or appropriate in the circumstances. The execution of such agreement by such Person(s) shall in no way relieve the Company, or any other transferor involved in any action described in Sections 10.1 or 10.2 hereof, of its obligations pursuant to this Agreement, without the separate, express consent of the Board to such a release.

10.6 Permitted Encumbrances. Nothing in this Section 10 shall be deemed to prohibit any assignment, pledge, lease, sublease, mortgage, or other transfer of all or any part of the System, or any right or interest therein, for financing purposes,

provided that each such assignment, pledge, lease, sublease, mortgage, or other transfer shall be subject to and subordinate to the rights of the City pursuant to this Agreement and applicable law. The consent of the City will not be required with respect to any transfer to, or taking of possession by, any banking or lending institution which is a secured creditor of the Company of all or any part of the System pursuant to the rights of such secured creditor under Article 9 of the Uniform Commercial Code, as in effect in the State of New York, and, to the extent that the collateral consists of real property, under the New York Real Property Law, provided that the City's rights are in no way adversely affected or diminished.

10.7 No Waiver. The grant or waiver of any one or more of such consents shall not render unnecessary any subsequent consent, nor shall the grant of any such consent constitute a waiver of any other rights of the City.

SECTION 11 -- LIABILITY AND INSURANCE

11.1 Liability and Indemnity

11.1.1 Company. The Company shall be liable for, and shall indemnify and hold the City, its officers, agents, servants or employees (the "Indemnitees") harmless from any and all liabilities, suits, obligations, fines, damages, penalties, claims, costs, charges and expenses (including, without limitation, attorneys' fees and disbursements), that may be imposed upon or incurred by or asserted against any of the Indemnitees arising out of the construction, operation, maintenance, repair or removal of the Fiber and the System and the construction, maintenance, and repair of the City Fiber or otherwise in connection with this Agreement arising out of or related to this contract, whether or not such damages are due to the negligence or otherwise of the City, its officers, agents, servants or employees; and it is a condition of this contract that the City assumes no liability for damages to either persons or property on account of the same, except as expressly provided herein.

11.1.2 No Liability for Public Work, etc. The City shall have no liability to the Company for any damage as a result of or in connection with the protection, breaking through, movement, removal, alteration, or relocation of any part of the

System by or on behalf of the Company or the City in connection with any emergency, public work, public improvement, alteration of any municipal structure, any change in the grade or line of any Street, or the elimination, discontinuation, and closing of any Street, as provided in Sections 2.4.5, 6.4.1 and 6.4.2 hereof. When possible, the Company shall be consulted prior to any such activity and shall be given the opportunity to perform such work itself. However, the City shall have no liability to the Company in the event it does not so consult the Company. All costs to repair or replace the System, or parts thereof, damaged or removed as a result of such activity, shall be borne by the Company.

11.1.3 No Liability for Damages. The City, its officers, employees, agents, and servants shall have no liability to the Company for any special, incidental, consequential, punitive, or other damages as a result of the exercise of any right of the City pursuant to this Agreement or applicable law, including, without limitation, the rights of the City to terminate, amend, or otherwise modify all or any part of this Agreement or the franchise granted herein. Notwithstanding anything in the foregoing to the contrary, the City shall be liable to the Company for its gross negligence and its willful misconduct.

11.1.4 Defense of Claim, Etc. If any claim, action or proceeding is made or brought against any of the Indemnitees by reason of any event to which reference is made in Section 11.1.1 hereof, then upon demand by the City, the Company shall either resist, defend or satisfy such claim, action or proceeding in such Indemnatee's name, by the attorneys for, or approved by, the Company's insurance carrier (if such claim, action or proceeding is covered by insurance) or by the Company's attorneys. The foregoing notwithstanding, upon a showing that the Indemnatee reasonably requires additional representation, such Indemnatee may engage its own attorneys to defend such Indemnatee, or to assist such Indemnatee in such Indemnatee's defense of such claim, action or proceeding, as the case may be, and the Company shall pay the reasonable fees and disbursements of such attorneys of such Indemnatee.

11.1.5 Limitations. (a) As between the City and the Company, the indemnity obligations of the Company pursuant to this Section 11.1 shall not apply to any Services provided or distributed over the System (including the City Fiber) to the extent that the Company has not provided such Services or performed any other act forming the basis of said claim, notwithstanding the City's use of the Company's Fiber.

(b) In the event the Company provides Service to the City, the Company's liability to the City for any damages or injury arising in connection with such service shall be no greater than its liability to any Customer for the same. The Company shall have no obligation to maintain, and no liability for any damage or other claim with respect to, the portion of any Drop Cable that is within a City Building, commencing at its point of entry into such City Building.

(c) Notwithstanding the provisions of Section 11.1, the City shall be liable to and indemnify the Company for any injury or damages to the Company, its officers, agents, employees, contractors, and third parties caused by its negligent action or inaction with respect to any condition in any City owned building and such injury or damage was not also caused by the Company, its officers, agents, employees and contractors.

11.2 Insurance.

11.2.1 Specifications. At or before the Closing, the Company shall, at its own cost and expense, obtain and furnish to the City, with copies to the Comptroller and the Director, a certificate of liability insurance policy insuring the Company and the City for any injury or damaged caused by the matters listed in Section 11.1 herein, in the minimum combined amount of FIFTY MILLION (\$50,000,000.00) DOLLARS, covering bodily injury,

including death and personal injury, and property damage. The insurance shall include contractual liability coverage, covering the Company's indemnification obligation set forth in Section 11.1 hereof. Such policy or policies shall be issued by companies duly licensed to do business in the State of New York and acceptable to the Comptroller. Such companies must carry a rating by Best's of not less than B+. The foregoing minimum limitation shall not prohibit the Company from obtaining a liability insurance policy or policies in excess of such limitations, provided that the City shall be named as an insured party to the full extent of any limitation contained in any such policy or policies obtained by the Company.

11.2.2 Maintenance. (a) The liability insurance policies required by Section 11.2.1 hereof shall be maintained by the Company throughout the term of this Agreement and shall continue until completion of removal of the Fiber from the Streets to the extent it is required pursuant to this Agreement. It may be provided under the same policy required under Section 11.2.1 of the Lower Manhattan Franchise Agreement.

(b) Each such liability insurance policy shall contain the following endorsement: "It is hereby understood and agreed that this policy may not be cancelled nor the intention not to renew be stated until ninety (90) days after receipt by the City, by registered mail, of a written notice of such intent

to cancel or not to renew." Within sixty (60) days after receipt by the City of said notice, and in no event later than thirty (30) days prior to said cancellation, the Company shall obtain and furnish to the Comptroller, with a copy to the Director, replacement insurance policies in a form reasonably acceptable to the Comptroller. The policy or policies providing the foregoing insurance shall be in a form acceptable to the Comptroller, together with evidence acceptable to the Comptroller demonstrating that the premiums for such insurance have been paid. Such insurance shall take effect at or before the Effective Date.

11.2.3 Increased or Decreased Insurance Coverage. The City, in the event of any substantially changed material circumstances following the Effective Date of this Agreement, and upon three (3) months notice to the Company, may alter the minimum limitation of the liability insurance policy or policies required in Section 11.2.1 hereof, but only to the extent reasonable and customary within the practices of the industry.

11.2.4 Liability Not Limited. The Company's indemnification obligations under Section 11.1.1 hereof shall not be limited by said insurance policies nor by the recovery of any amounts thereunder.

SECTION 12 -- SPECIFIC RIGHTS AND REMEDIES

12.1 Not Exclusive. The Company agrees that the City shall have the specific rights and remedies set forth in this Section 12. These rights and remedies are in addition to and cumulative with any and all other rights or remedies, existing or implied, now or hereafter available to the City at law or in equity in order to enforce the provisions of this Agreement. Such rights and remedies shall not be exclusive, but each and every right and remedy specifically provided or otherwise existing or given may be exercised from time to time and as often and in such order as may be deemed expedient by the City, except as provided herein. The exercise of one or more rights or remedies shall not be deemed a waiver of the right to exercise at the same time or thereafter any other right or remedy nor shall any such delay or omission be construed to be a waiver of or acquiescence to any default. The exercise of any such right or remedy by the City shall not release the Company from its obligations or any liability under this Agreement.

12.2 Security Fund

12.2.1 Amount. On or before the Closing, the Company shall have deposited with the Comptroller an irrevocable, unconditional letter of credit, in the amount of Five Million (\$5,000,000.00) dollars. The amount of such letter of credit to

be provided to the Comptroller shall constitute the Company's Security Fund. Upon completion of construction of the Initial Backbone, the amount of the Security Fund shall be reduced to One Million Seven Hundred Fifty Thousand (\$1,750,000.00) dollars. At any time during the term of this Agreement, the City may, in its sole discretion, require the Company to increase the amount of the Security Fund if it finds that new risk factors exist which reasonably necessitate an increase in the amount of the Security Fund, such as an increase in the amount of compensation payments to be made pursuant to Section 8.1.1 hereof or the failure of the Company to perform any of its obligations pursuant to this Agreement.

12.2.2 Purpose. The Security Fund shall serve as security for: (a) payment of the franchise fees set forth in Section 8.1.1(a);

(b) the performance of its obligations set forth in Section 8.1.1(b)(i)-(iii);

(c) the payment of premiums for the liability insurance required pursuant to Section 11.2.1;

(d) the removal of the Fiber from the Streets at the termination of the Agreement, at the election of the City, pursuant to Section 12.6.1;

(e) the payment to the City of any amounts for which the Company is liable pursuant to Section 11.1.1 which are not covered by the Company's insurance;

(f) the payment of any other amounts which become due to the City pursuant to this Agreement or law;

(g) the timely renewal of the letter of credit that constitutes the Security Fund; and

(h) any costs, losses or damages incurred by the City as a result of a default of the Company's obligations of this Agreement.

12.2.3 Withdrawals from the Security Fund. In accordance with the procedures set forth in Sections 12.2.4, 12.4.4 and 12.4.5, the Comptroller may withdraw from the Security Fund and pay to the City the amounts specified in such Sections.

12.2.4 Notice of Withdrawals. Within one (1) week after any withdrawals from the Security Fund, the Comptroller shall notify the Company of the date and amount thereof.

The withdrawal of amounts from the Security Fund shall constitute a credit against the amount of the applicable liability of the Company to the City but only to the extent of said withdrawal.

12.2.5 Replenishment. Throughout the term of this Agreement, and for ninety (90) days thereafter, the Company shall maintain the Security Fund in the amount specified in Section 12.2.1 hereof. Within thirty (30) days after receipt of notice from the Comptroller that any amount has been withdrawn from the Security Fund, as provided in Section 12 hereof, the Company shall restore the Security Fund to the amount specified in Section 12.2.1 hereof, provided that, if a court determines that said withdrawal by the City was improper, the City shall refund the improperly withdrawn amount to the Company.

12.2.6 Not a Limit on Liability. The obligation to perform and the liability of the Company pursuant to this Agreement shall not be limited by the acceptance of the letter of credit required by this Section.

12.3 Liquidated Damages. (a) The Company agrees that each of the defaults set forth in this Section 12.3 shall result in injuries to the City, the compensation for which will be difficult to ascertain and to prove. Accordingly, the Company agrees that the liquidated damages in the amounts set forth below are fair and reasonable compensation for such injuries. The